

**STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )**

**BEFORE THE CHIEF PROCUREMENT OFFICER**

**DECISION**

In the Matter of Protest of: )

**CASE NO. 2008-151**

Waldrop Mechanical Services )

Clemson University )

**POSTING DATE:**

Best Value Bid No. 6737-9/12/08 )

Mechanical/Plumbing Services )

**FEBRUARY 2, 2009**

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Waldrop Mechanical Services (Waldrop). With this best value bid (BVB), Clemson University (Clemson) attempts to procure mechanical and plumbing services for the International Center for Automotive Research (ICAR) campus. In the letter, Waldrop protested Clemson's intent to award to Cullum services, Inc. (Cullum) alleging that 1) "The variances in the submitted price proposals demonstrate that the proposing parties had significant, differing interpretations of the RFP", 2) "Based upon conflicting narrative between the original RFP and amendment #2, it is our position that the apparent low bidder has submitted a price to cover a limited scope of services and does not comply with the respective agency's intended scope of the project", and 3) "It is our position that the apparent low bidder has provided an incomplete scope of work (preventive maintenance only) for the proposed price."

In order to resolve the matter, the CPO conducted a hearing January 22, 2009. Appearing were Waldrop, represented by Bill Caldwell and Bill Gruss; Cullum, represented by Rudy Cullum, III; and Clemson, represented by Mike Nebesky, Scott Pigeon, and Mike Davis.

### **NATURE OF PROTEST**

The letter of protest is attached and incorporated herein by reference.

## **FINDINGS OF FACT**

The following dates are relevant to the protest:

- 1) Issuance of Best Value Bid (BVB) – Sept 1, 2008
- 2) Mandatory Pre-Bid Meeting – September 10, 2008
- 3) Issuance of Amendment #1 – September 12, 2008 (to address changes discussed at pre-bid meeting)
- 4) Issuance of Amendment #2 – September 19, 2008 (to answer questions asked by potential Offerors)
- 5) Bid Opening/Closing – October 15, 2008 at 2:45pm
- 6) Evaluators Given Proposals and Instructions – October 17, 2008
- 7) Evaluation Completed – October 31, 2008
- 8) Award Issued – November 12, 2008
- 9) Protest received – November 20, 2008

## **CONCLUSIONS OF LAW**

Waldrop alleging that 1) “The variances in the submitted price proposals demonstrate that the proposing parties had significant, differing interpretations of the RFP”, 2) “Based upon conflicting narrative between the original RFP and amendment #2, it is our position that the apparent low bidder has submitted a price to cover a limited scope of services and does not comply with the respective agency’s intended scope of the project”, and 3) “It is our position that the apparent low bidder has provided an incomplete scope of work (preventive maintenance only) for the proposed price.” All three issues of protest restate the same question – did Clemson dramatically alter the scope of work from preventive maintenance only to add repairs with its answer to question # 1 in Amendment #2?

The BVB reads, “This scope of Work shall include maintenance of all equipment as specified in this document. Maintenance shall include Work associated with any, but not limited to, of the following terms: maintenance, preventive maintenance, service, regular service.” Further, the BVB reads, “All Work, specific

or base bid, shall include the costs of all equipment, vehicles, fuel, and other associated materials necessary to complete the work.” [Ex. 1, p. 4, Scope of Work, 9.A. and 9.K.] All parties agreed that the original scope of work was preventive maintenance. In Amendment #2, Clemson responded to questions received. Question #1 reads, “Does the scope include repair parts and labor?” Clemson answered, “Refer to Sections 9.A & 9.K of the RFP. Answer is yes.” [Ex. 3, p. 2]

Waldrop argued this answer added to the scope of work all mechanical and plumbing repairs that might occur during the life of the contract, escalating the scope of work from preventive maintenance per the original BVB. Clemson disagreed, arguing that the reference in the answer to question #1 to 9.A. and 9.K. make it clear that the scope of work remained preventive maintenance and included only the parts and labor costs to complete required preventive maintenance. Cullum noted the additional requirement of the scope of work stated in 9.M. that distinguished repairs from preventive maintenance by providing Clemson the option to negotiate additional pricing with the contractor for repairs that might occur. That provision reads, “The Owner reserves the right to negotiate pricing for unforeseen conditions that may arise during the course of the contract. This shall include, but not be limited to, items such as pipe leak repairs, equipment failure not due to negligence, acts of nature, accidents, etc.” [Ex. 1, p. 5, Scope of Work, 9.M.]

The CPO agrees with Clemson. Read in isolation, the amendment could be interpreted as amending the scope of work as Waldrop suggests. However, read in conjunction with the other solicitation documents, as it must be, the amendment is clear that Clemson did not intend to alter the scope of work to add all repairs. Clemson identified the scope of work to be preventive maintenance and included with the BVB CDs of the manufacturers’ preventive maintenance requirements for all equipment covered under the solicitation. [Ex. 1, Attachment D] The BVB required bidders to perform all preventive maintenance required by the manufacturers of their equipment. By referencing sections 9.A. and 9.K., which limited the scope of work to preventive maintenance, Clemson clarified its answer to be the preventive maintenance requirements of the

BVB. While not crystal clear, the amendment clarified that the contractor would be required to provide all parts and labor necessary to complete the preventive maintenance tasks only.

Item 9.M. clearly allowed for subsequent negotiation of additional costs for repairs. The Amendment did not add unforeseen repairs as mandatory requirements to be covered under the original bidder price, but rather, offered the option to negotiate additional pricing for those occurrences.

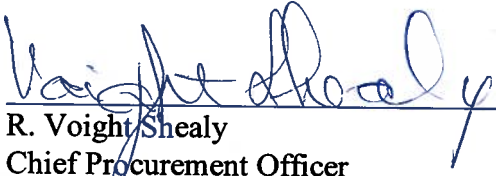
Clemson argued that questions concerning the solicitation would be untimely before the CPO after award. Clemson notified prospective bidders of their duty to inquire about ambiguities in the solicitation reading:

Offeror, by submitting an Offer, represents that it has read and understands the Solicitation and that its Offer is made in compliance with the Solicitation. Offerors are expected to examine the Solicitation thoroughly and should request an explanation of any ambiguities, discrepancies, omissions, or conflicting statements in the Solicitation. Failure to do so will be at the Offeror's risk. Offeror assumes responsibility for any patent ambiguity in the Solicitation that Offeror does not bring to the University's attention." [Ex. 1, p. 2, Duty to Inquire]

Waldrop could have raised its question regarding the meaning of Amendment #2, but did not. Further, the Consolidated Procurement Code reads, "A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(a) within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue." [11-35-4210(A)] Waldrop could have protested Amendment #2, but did not. Had Waldrop taken either step, Clemson could have avoided this matter entirely by clarifying its answer to the question.

**DETERMINATION**

For the aforementioned reasons, the protest is denied.

  
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R. Voight Shealy  
Chief Procurement Officer  
for Supplies and Services

  
\_\_\_\_\_  
Date

Columbia, S.C.

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

**FILE BY CLOSE OF BUSINESS:** Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

**FILING FEE:** Pursuant to Proviso 83.1 of the 2008 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

**LEGAL REPRESENTATION:** In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).



REC'D BID CONTROL

November 20, 2008

NOV 21 '08 FR 10:08AM

Chief Procurement Officer  
Materials Management Office  
1201 Main Street, Suite 600  
Columbia, South Carolina 29201

Re: Official Protest- Solicitation # 6737- 9/12/08  
Mechanical/Plumbing Services (CU-ICAR) Annual

Dear Sir:

Based upon the wide range of prices received by Clemson University for the subject solicitation, it is apparent that varying interpretations of the RFP were prevalent by the proposing contractors. Due to this situation, we respectfully request that the Materials Management Office review the following information along with other pertinent facts relative to this solicitation. The variances in the submitted price proposals demonstrate that the proposing parties had significant, differing interpretations of the RFP. Prior to awarding a contract to any proposing party, it is important for the State and the agency to ensure that the apparent low bidder has included all phases of the intended scope of the RFP. Based upon conflicting narrative between the original RFP and amendment #2, it is our position that the apparent low bidder has submitted a price to cover a limited scope of service and does not comply with the respective agency's intended scope for the project.

Factual information regarding this solicitation is as follows:

- The four prices received by the University for this solicitation are as follows:

Apparent Low Bid-	\$ 52,825
2nd bid	\$ 117,837 which represents 223% of low bid
3 <sup>rd</sup> bid	\$ 159,253 which represents 301% of low bid
4 <sup>th</sup> bid	\$ 490,167 which represents 928% of low bid

- The applicable work scope narrative in the RFP is as follows:

Paragraph 9A of RFP reads: "This scope of work shall include maintenance of all equipment as specified in this document. Maintenance shall include Work associated with any, but not limited to, the following terms: maintenance, preventative maintenance, service, regular service."

Paragraph 9K of RFP reads: "All Work, specific or base bid, shall include the cost of all equipment, vehicles, fuel, and other associated materials necessary to complete the work.

- The conflict in work scope narrative is identified in amendment #2, answer to question #1 which reads as follows:

"Does the scope include repair parts and labor?" The agency's answer is as follows: "Refer to Sections 9A & 9K of the RFP. Answer is yes."

It is our position that the aforementioned answer to question #1 amends the RFP to request full service coverage, including all repairs, parts, and labor for the contract duration. This is different from the original RFP which clearly states "maintenance, preventative maintenance, service, regular service."

In our industry, repair work and preventative maintenance services are mutually exclusive and should not be considered as the same.

It is our position that the apparent low bidder has provided an incomplete scope of work (preventative maintenance only) for the proposed price.

Prior to awarding the contract to the apparent low bidder, we request the State to make the appropriate inquiries to ensure that the apparent low bidder does indeed have a full service scope of work (as identified in the RFP and amendment) covered with the proposed price.

Please advise the undersigned of the results of your findings to this matter.

Sincerely,



Bill Gruss

Commercial Service Manager

cc: Bill Caldwell  
Randy Vaughn